

cannot support the children they can be sent to the father who supports them and looks after them on condition that he cannot change their tribe.

The Kathi was also called and gave evidence that in his opinion under the *Hukum Shara* the mother had the custody until the children were ten and the father had to provide maintenance.

In this case the respondent did not establish before the Magistrate what were the terms of the custom on which he relied. And even if it is conceded that, under the *adat*, the rule is as given in the two cases cited, then as "*adat* is right action in the matters of every day life as well as in obedience of the law of the land" (Papers on Malay Subjects—Law—*Wilkinson*, page 14), right action or equity or justice would not permit it to be applied to this case where the facts are different. Also in this case the expert evidence is contradictory. The senior *lembaga* seems to realize the difficulty. As I understand his evidence he would give the husband custody though that appears contrary to the rule stated above and is contrary to Muhammadan Law and to the interest of the infant children. I think he meant that as the father was entitled to custody owing to the lack of property in the mother, the father ought in principle to maintain the children. But it involves even a good deal of reading between the lines of the evidence to reach that conclusion as to the meaning of his evidence.

I think in the circumstances of this case that as the respondent has married under the Muhammadan Law and has exercised the right of polygamy so given to him, he must, in the absence of proof of a custom varying that law, be bound by that law so far as it affects his duties to these children of the appellant.

For those reasons I set aside the Magistrate's order and made an order for maintenance.

Order for maintenance.

[APPELLATE CRIMINAL JURISDICTION]

HORNE, J.

September 30, 1940.

CHELLIAH v. PUBLIC PROSECUTOR.

[N.S. MAGISTRATE'S CRIMINAL APPEAL

No. 32 of 1940]

*Criminal Procedure Code, S. 261 (Proviso)—
Change of Magistrate during hearing.*

Where a case is partly heard before one Magistrate and adjourned and the hearing is resumed before another Magistrate, it is obligatory for the second Magistrate to recall witnesses if the accused asks for them.

MAGISTRATE'S CRIMINAL APPEAL.

Muttu-Ramalingam for Appellant.

Grattan-Bellew, Deputy Public Prosecutor, for
Public Prosecutor (Respondent).

Horne, J.—The appellant was charged with using on the 2nd March, 1939, a motor car with inefficient brakes. On the 24th March, 1939, two prosecution witnesses were examined and an adjournment allowed to 31st March. On that day a further adjournment took place to 21st April and there is nothing on the record to show what happened on that day. The case was resumed by another Magistrate on the 26th January, 1940, when the advocate for the appellant asked the Magistrate to recall the witnesses for the prosecution. The *proviso* to section 261 of the Criminal Procedure Code which governs a change of Magistrate during a hearing is in these terms:—

"(a) In any trial the accused may, when the second Magistrate commences his proceedings, demand that the witnesses or any of them be re-summoned and re-heard;"

In my opinion, such a word as "demand" makes it obligatory for the Magistrate to recall such witnesses if the accused asks for them and leaves no discretion to the Magistrate to act upon evidence partly recorded by his predecessor and partly by himself.

The conviction is quashed and the fine paid is to be returned.

I would add that the time elapsing between the offence viz. 2nd March 1939 and the conviction 30th January 1940, a period of almost eleven months, is an inexcusable delay having regard to the nature of the charge. Apparently the fault lies with the first Magistrate in granting an indefinite adjournment.

Conviction quashed.

[APPELLATE CRIMINAL JURISDICTION]

HORNE, J.

September 30, 1940.

MURUGIAH v. PUBLIC PROSECUTOR.

[NEGRI SEMBILAN MAGISTRATE'S CRIMINAL

APPEAL No. 34 of 1940]

Appeal—grounds of decision—necessity for stating reasons for believing or disbelieving evidence for prosecution or for accused—Criminal Procedure Code; S. 307 (iii); Theft—accused's explanation—sufficiency of.

In giving his "grounds of decision" under Section 307 (iii) of the Criminal Procedure Code, a Magistrate should state, except in the simplest of cases, the reasons why he believed or disbelieved the evidence given on behalf of the prosecution or of the accused, and not

merely "I disbelieve the evidence of the prosecution"...
"I believe the evidence of the accused."

In a case of theft it is not necessary for an accused to convince the trial Magistrate of the truth of his explanation; it is sufficient if the explanation may reasonably be true even if the Magistrate is not convinced of its truth.

Rex v. Schama⁽¹⁾ applied.

Case referred to:—

(1) *Rex v. Schama*, 11 Cr. App. R. 45.

MAGISTRATE'S CRIMINAL APPEAL.

C. M. P. Pillai for the appellant.

Grattan-Bellew, Deputy Public Prosecutor, for the Public Prosecutor, Respondent.

Horne, J.—In this appeal the evidence of identification is unsatisfactory. The stolen bicycle dynamo and lamp are articles in common use and scratches resulting from use can hardly be accepted as distinguishing marks.

Further, having regard to the time elapsing between the theft and the identification viz. seven weeks, the presumption arising from recent possession can hardly apply.

Even if the goods are satisfactorily identified as having been stolen seven weeks beforehand then the explanation offered by the accused was not treated fairly by the Magistrate. It is not necessary for him to convince the Magistrate of the truth of his explanation; it is sufficient if the explanation may reasonably be true even if the Magistrate is not convinced of its truth—*Rex v. Schama*,⁽¹⁾. Moreover there was no evidence to rebut this explanation. The Magistrate's mind may have been affected by the evidence of Long Che bin Naim (Probationary Inspector). His evidence being a statement made in the course of the investigation was inadmissible as part of the evidence of the prosecution—(section 113 (i) Criminal Procedure Code).

There is no evidence of a dishonest retention of stolen property. The conviction is quashed.

It does not appear to me that a Magistrate complies with section 307 (iii) of the Criminal Procedure Code which requires him to give the "Grounds of Decision" by stating "I believe the evidence of the prosecution" "I disbelieve the evidence of the accused." I think the Magistrate should state, except in the simplest of cases and they usually are not the subject of appeal, the reasons why he believed or disbelieved the evidence in question.

Conviction quashed.

JOHORE REPORT.

[ORIGINAL CIVIL JURISDICTION]

MILLS, J.

October 11, 1936.

VANA NAVANA SOONA SOCKALINGAM CHETTIAR Plaintiff

vs.

CHONG HEE BOON Defendant.

[BATU PAHAT CIVIL SUIT No. 30 of 1935]

Practice—Civil Procedure Code: Section 81—Substituted Service—To be allowed only when defendant within jurisdiction at date of issue of summons.

Before the Court orders substituted service under section 81 (1) of the Civil Procedure Code, it must be satisfied on two points, viz:—

- (1) that the defendant at the date of issue of the Summons was resident within the State, and
- (2) either (a) that there is reason to believe that the defendant is keeping out of the way for the purpose of avoiding service, or (b) that for any other reason the Summons cannot be served in the ordinary way.

SUMMONS-IN-CHAMBERS.

The plaintiff applied for substituted service of the Summons under section 81 of the Civil Procedure Code and his application was dismissed by the Assistant Registrar. The plaintiff appealed to the Judge.

Demuth for plaintiff (*Ex Parte*).

Cur. Adv. Vult.

Mills, J.—On application being made for the substituted service of the summons in this suit, the Assistant Registrar at Batu Pahat dismissed the application on the ground that he was not satisfied that at the date of the issue of the summons the defendant was resident within the State. Counsel for the plaintiff appeals to the Judge on the ground that on a proper construction of Section 81 of the Civil Procedure Code, it is not necessary to prove that at the date of the issue of the summons the defendant was resident within the State.

I have therefore to interpret that Section.

It reads as follows:—

"(1) Where the Court is satisfied that the defendant at the date of issue of the summons was resident within the Federated Malay States, and that there is reason to believe that the defendant is keeping out of the way for the purpose of avoiding service or that for any other reason the summons cannot be served, the Court shall order...."

There are two possible interpretations.

The first is this: